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BUSINESS POLICIES INCONSISTENT WITH PUBLIC EMPLOYMENT.

Dedicated to Professor Langdell.

I.

ALTHOUGH from the earliest times some restraint has been exercised over such lines of activity as are of vital interest to the public, in recent times there undoubtedly is an increasing need of stricter regulation of those important employments which are affected with a public interest. It is true that there are many men who still avow the principle of *laissez faire*, who say that it is the better policy to leave all business with as little interference from the law as possible; but most men now realize that a sharp distinction must be drawn between the ordinary private businesses and the exceptional public callings. Indeed, in the case of the modern public service companies, their power over all commercial activities has become so apparent that the necessity for the control of that power for the protection of the whole people is generally conceded; and it is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation. In this crisis of affairs it behooves lawyers to show the people that the law is indeed adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified which are truly inconsistent with public duty. Undoubtedly it is now thoroughly understood by all who conduct public

services that they must not unjustifiably refuse applications for service, wilfully neglect to provide adequate facilities, unreasonably demand unusual prices or capriciously discriminate between their patrons. Nevertheless it is occasionally asserted by the managers of a public employment that they may refuse to give service when it becomes necessary to protect their business interests; and more frequently the right is claimed to make differences in their prices in order to promote their business interests. This position that the same business policies are justifiable in public employments as in private enterprises is taken with such confidence at times, that it is most necessary that those who are conducting the public services should be told in so uncompromising a manner that they may at length realize its full significance, that, while those who conduct private enterprises may devise many schemes so long as they keep within the limits of fair competition, those who profess a public employment must not adopt any business policies which are in any way truly inconsistent with their public duties.

II.

From a business standpoint it may be an effective policy at times to refuse to have any dealings with a customer who persists in patronizing a rival, and certainly it is often advantageous to make a lower price to customers who will give exclusive patronage. This is fierce competition in both cases, but it must be admitted that it is all fair enough in individual competition, although very probably concerted action of either sort would constitute an actionable conspiracy, because when monopoly is present these policies become too oppressive to be borne. The employment of such policies might well be forbidden those who conduct public services upon this ground alone, since in such businesses virtual monopoly is usually present. Moreover, in the case of public services such a policy would seem to be in the face of the public duty to serve all that apply and treat all without discrimination. But although it will be seen that the law is positive that in public service outright refusal to deal with an applicant who is patronizing a rival is illegal, the law does not seem to be so clear that special reductions may not be made to those who will give exclusive patronage.

If one accepts the premise that in a public service one may do nothing to foster his own interests that is inconsistent with his

public duty, it is impossible to justify the outright refusal to serve an applicant, who wishes service, on the ground that he is dealing with a rival. An example of this is Chicago & Alton R. R. Co. *v.* Suffern,[1] where the court held that a railroad could not refuse to receive coal from a shipper who had begun to make shipments by another route, basing its decision upon the ground that serious injury would result to the business interests of the people if shippers could be compelled by such arbitrary measures to patronize one railroad to the exclusion of others. Upon somewhat similar principles, in a later case, Portland Natural Gas & Oil Co. *v.* State,[2] it was held an insufficient answer to a *mandamus* to compel a company to supply an applicant with gas, that the relator was being supplied by another gas company; for the court said that it would not permit the establishment of perpetual rights to give exclusive service by any such arrangements.[3]

The advantages which may accrue to a public service company if it may make lower rates to those who will deal with it exclusively are plain, and this policy would doubtless largely prevail in making rates for competitive business, if it were not for the general recognition of its essential illegality. It has already been seen that those who conduct a public employment must forego many methods of getting business and holding it which are permissible in private affairs. And it would seem to be plainly contrary to public duty for a public servant to charge certain applicants more than others because they have dealings with a rival. Most courts so hold, for reasons best expressed in the leading case of Menacho *v.* Ward.[4] In that case a regular line to Cuba put upon a black-list those who shipped by tramp steamers and charged them higher rates than others. Such discrimination, the court said, is not only unreasonable but is odious, because of its tendency to destroy competition and establish monopoly. On the other hand, in an important case in New York, Lough *v.* Outerbridge,[5] where a steamship company made a lower rate to those merchants who would not ship by a

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[1] 129 Ill. 274.

[2] 135 Ind. 54.

[3] Two other cases upon this general subject should be stated. In the leading case of Bennett *v.* Dutton, 10 N. H. 481, it was held that a passenger who had come from Lowell to Nashua by a rival line must be taken from Nashua to Amherst. And in the recent case of Gynne *v.* Citizens' Telephone Co., 61 S. C. 83, it was held that an applicant for a telephone could not be refused on the ground that he was a subscriber to a rival telephone system. The discussion in both of these cases is well worth careful reading.

[4] 27 Fed. Rep. 529.

[5] 143 N. Y. 271.

rival line, the court held that there was no illegal discrimination, since the concession was offered to all who would conform with the condition.

Notwithstanding the weight to be given to this decision, it is submitted that it is opposed to what are conceived to be fundamental principles. As between two shippers who offer the same goods for the same transportation, it seems to constitute personal discrimination, with all its accompanying evils, to make one rate to one and another rate to another by reason of the fact that one ships exclusively and the other does not. And it ought to be plain that this is so, whether it is done as in Menacho *v.* Ward,[1] by charging the one who does not ship exclusively more than the usual rate, or, as in the case of Lough *v.* Outerbridge,[2] by giving exclusive shippers concessions from regular rates.[3]

III.

Another policy which is often of such obvious advantage as to be common in ordinary business is to make lower proportionate rates to larger than to smaller customers, and even occasionally to decline to deal with very small customers who may be more trouble than they are worth. The latter is a small matter, perhaps, while the former is a matter of great moment to the managers of public services, who may often see the opportunity to get large amounts of valuable business, highly profitable in the aggregate even at lower proportionate rates, if they can still maintain higher proportionate rates upon the regular business which they get from smaller customers who are not in a position to dictate their terms.

It should be obvious that in a public employment all applicants must be served at fair rates, even if in a particular case it is espe-

[1] *Supra.* [2] *Supra.*

[3] The jurisdictions are divided still upon the fundamental question whether there is a general principle against every form of discrimination at common law, although today the rule against all discrimination is established by the great weight of authority. In none of these majority jurisdictions has the fact that the favored applicant is an exclusive customer been held to constitute a justifiable difference, although this justification has been urged several times unsuccessfully. Mobile *v.* Bienville Water Co., 130 Ala. 379; L. E. & St. L. C. R. *v.* Wilson, 132 Ind. 517; Messenger *v.* Pennsylvania R. R., 37 N. J. L. 531; Railroad Discrimination Case, 136 N. C. 479; Scofield *v.* Ry. Co., 43 Oh. St. 571; Baxendale *v.* Great Western R. R., 5 C. B. (N. S.) 309. It proves little, of course, that in several of the jurisdictions which have held that there is no rule against discrimination as such, it has been held not improper to grant special reductions to exclusive customers. *Ex parte* Benson & Co., 18 S. C. 38; Houston & T. C. R. R. *v.* Rust & Durkins, 58 Tex. 98.

cially bothersome or even particularly expensive. Those who profess a public employment must fulfill their public duty to all who apply, and must realize that this will be more troublesome in some cases than in others; and indeed, so long as the business as a whole is profitable, they should not complain if some occasional services may result in loss. This was pointed out very clearly in State *v.* Citizens' Telephone Co.,[1] where the defendant telephone company relied upon the fact that in order to serve the plaintiff applicant it would be obliged to install a new switch-board at great additional expense; but the court felt that this furnished no sufficient ground to justify a refusal to serve this member of the public upon the same terms as any other person.[2] Whatever serious loss may result from being obliged to serve in small units, may be avoided by the practice of establishing fixed units of reasonable size in which alone services will be rendered. This system of minimum rates has been supported by several cases, among them the case of Gould *v.* Edison Electric Co.,[3] in which it was held that an electric company might fairly charge a consumer $1.50 a month even if less electricity by measure was used in that month.[4]

It is common knowledge that in the conducting of many large public services discounts have been made to large customers in order to get their trade and to retain it, and although this practice is not often made public at the present time, still it is the policy sometimes adopted and, when attacked, openly defended. That this policy may be often advantageous in public, as it is in private business, may be admitted. But it has already been seen that public duties may conflict with business policies; and that such a policy does conflict with public business may be argued from its deplorable results. The undue favoring of large customers will

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[1] 61 S. C. 83.

[2] Harp *v.* C. O. & Gulf Ry., 125 Fed. Rep. 445, which held that a railroad may take the attitude that it will deal only with large customers who have special equipment for shipment, must be wrong; the contrary is held in Thompson *v.* Pennsylvania Ry., 10 I. C. C. Rep. 640.

[3] 60 N. Y. Supp. 559.

[4] Upon similar principles a water company may refuse to supply water for less than a period of three months (Harbison *v.* Knoxville Water Co., 53 S. W. Rep. 993 (Tenn.)); while it would be unreasonable to make the unit so long as a year (Rockland Water Co. *v.* Adams, 84 Me. 472). Perhaps more familiar examples are the flat five cent fare upon street railways, even if the passenger rides but one block (Milwaukee Electric Ry. Co. *v.* Milwaukee, 87 Fed. Rep. 577), and the one hundred pound minimum rate upon package freight (Wrigley *v.* C. C. C. & St. L. Ry., 10 I. C. C. Rep. 412).

give them such commercial advantages that they will crush out their smaller competitors; and this is particularly true when a railroad company adopts the policy of making lower proportionate rates to large customers as such. This was the line of argument relied upon by the court in the leading case of Hays *v.* Pennsylvania R. R. Co.,[1] where the rather plausible scheme was adopted of a sliding scale by which the amount of rebate was graduated by the quantity of freight furnished by each shipper, a scheme which the railroad urged was adopted in good faith for the purpose of stimulating production and increasing its tonnage. But the court said that if the rate was fixed by the business furnished the railway, the smaller operator must sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. Although this case now represents the great weight of authority, it must be admitted that there is still a respectable minority which holds that lower relative rates may be made to large customers despite the injury which small customers must suffer thereby. In the case of Silkman *v.* Water Commissioners,[2] for example, it was held that lower water rates might be given to large consumers than to small consumers, the court saying that to make such differences was a business principle of general application. The courts which take this view profess to limit their doctrine by the qualification that the differences between the rates for large and small customers must not be unreasonable, but it is difficult to see any standard by which that difference may be tested if it is once permitted; and indeed it may be asserted with confidence that it is opposed to fundamental principles whenever the services to large customers and to small customers are practically identical, as they usually are.[3]

Although it may fairly be said that the services are practically identical when it is simply a question between two customers, one of which pays larger agregate bills than the other by reason of the fact that his total requirements may have been greater, it is necessary to point out that there are differences in the cost of

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[1] 12 Fed. Rep. 309.

[2] 152 N. Y. 327.

[3] By the undoubted weight of authority it is illegal to make reductions to large customers as such. Western U. T. Co. *v.* Call Pub. Co., 161 U. S. 92, affirming s. c., 44 Neb. 326; Hays *v.* Pa. Fuel Co., 31 Fed. Rep. 652; Kingsley *v.* B. N. Y. & P. Ry., 37 Fed. Rep. 181; United States *v.* Tozer, 39 Fed. Rep. 369; L. E. & St. L. R. R. *v.* Wilson, 132 Ind. 517; Cook *v.* C. R. I. & Pac. Ry., 81 Ia. 551; Scofield *v.* Ry. Co., 43 Oh. St. 571; Fitzgerald *v.* Grand Trunk Ry., 63 Vt. 169. But see the elaborate opinions to the contrary in C. & P. R. R. *v.* Forsaith, 59 N. H. 122, and Silkman *v.* Yonkers Water Commissioners, 152 N. Y. 327.

service by reason of the ways in which business is handled; and in so far as these economies in handling business in large units are real, a proportionate reduction may be made to the customer who has services in more convenient units. For example, the economies of transportation in carload lots are very great, and recognizing this fully in an early ruling, Scofield *v.* Lake Shore & Michigan Southern R. R. Co.,[1] the Interstate Commerce Commission held not unreasonable a rate per hundred pounds upon refined oil in less than carload lots one hundred per cent greater than the rate upon carload lots, remarking that there was fully that difference in the cost of handling the freight. And in a recent United States Supreme Court decision, Western Union Telegraph Company *v.* Call Publishing Co.,[2] it was recognized that lower proportionate rates might be made upon long press messages than upon ordinary short commercial messages, the court saying that the principle of equality forbids any difference in charge which is not based upon difference in service, and that even then it must have some reasonable relation to the amount of difference.[3] Neither of these holdings, it will be noticed, would justify the granting of lower proportionate rates to large customers, as such. Under the first ruling a lower proportionate rate should not be made to the shipper of many carloads as compared with the shipper of one carload; nor under the second decision should a lower proportionate rate be given a newspaper which sent many separate messages than one which sent few. It may also be pointed out that the customer whose annual bills are the largest, or whose business is largest in the aggregate, may be the one who asks services in the most inconvenient units and in the most expensive ways. All this being so, granting a special concession to large customers as such is in the face of the public service law, which requires that all should be served without discrimination, — an unanswerable objection, however advantageous this policy may be in obtaining business.

[1] 2 I. C. C. Rep. 90. [2] 181 U. S. 92.

[3] It is generally recognized that the more convenient service may be charged for at a proportionately less rate. Thus a shipper who furnishes his own terminal facilities may be given a lower rate to that extent. Root *v.* Long Island R. R., 114 N. Y. 330. And, again, a shipper who furnishes his own cars may properly be allowed their rental value. State *v.* C. N. O. & T. P. Ry., 47 Oh. St. 130. So well agreed is it that the difference in cost of service must be demonstrated clearly, that in the United States, at all events, the granting of a lower rate per car for a train load is forbidden. Paine Bros. *v.* Lehigh Valley R. R., 7 I. C. C. Rep. 218. But see an English case, Nicholson *v.* Great Western Ry., 5 C. B. (N. S.) 366, holding it justifiable to make a concession to the shipper of regular train loads.

IV.

In pursuance of the same policy of increasing the total profits by reaching out for additional business which may be obtained by making concessions from the ordinary rates charged regular customers, many managers of public services claim the right to make special concessions for special kinds of business, in which the ordinary prices could not be afforded. The same argument is made here which is made elsewhere, that handling this additional business will normally tend to the benefit of regular customers, since the additional business, if rightly managed in their interest, will relieve the regular business of a share of the fixed charges.[1]

It is perhaps necessary to point out here that a public service may to a certain extent limit its profession and accordingly refuse to enter upon lines of business which it does not wish to undertake, and that in such a case it cannot be compelled to perform upon any terms for any one. And it might therefore make special bargains in individual cases in reference to the performance of such outside business, without committing itself to serve all that apply; but it does not follow that, if it has once professed a line of business, it can limit its profession of that business to certain persons engaged in it. There is an English case, *In re* Oxlade,[2] which seems to say that if a certain railroad undertook to carry coal only for colliery owners, it could not be obliged to take it for any other class of persons; but this can hardly be, for it seems altogether inconsistent with the simplest rules of public duty. And in an American case, Haugen *v.* The Albina Water Co.,[3] where a water company with mains laid in a street attempted to limit its duty to persons living upon certain portions of that street, it was held that the company owed service to all applicants located within its territory without discrimination.

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[1] These views formerly had such currency that several courts were willing enough that common carriers should make a lower rate for freight shipped from B to C, which originally came from A, than for freight, of local origin, which was shipped from B to C. See Johnson *v.* P. & P. R. R., 16 Fla. 623; Ragan & B. *v.* Arken, 9 Lea (Tenn.) 609. But by the present view such concessions are held plainly unjustifiable, since they involve personal discrimination. Wight *v.* United States, 167 U. S. 512; B. & W. R. Co. *v.* Mobile, etc., Ry. Co., 60 Fed. Rep. 545; Fitzgerald *v.* Grand Trunk Ry., 63 Vt. 169; Brandt Milling Co. Case, 4 Can. Ry. Cas. 259. Upon similar principles it is not allowable to make lower rates for transportation from A to B for goods eventually destined for C. Alabama, etc., Ry. v. Railroad Commission, 86 Miss. 667; Hope Cotton Oil Co. *v.* T. & P. Ry., 10 I. C. C. Rep. 696.

[2] 15 C. B. (N. S.) 680.

[3] 21 Ore. 411.

If public companies may not refuse to deal with persons who want services for one purpose while they profess to serve others who want the same services for another purpose, it would seem to follow that, in their dealings with their patrons who ask the same service, a public company ought to charge all alike, without regard to the need they have of the service. It is true that the results are not so deplorable when the discrimination is between patrons who put the service to different usage as they are when the discrimination is between applicants who are competitors; but it is submitted that from a logical point of view there is substantially the same illegality, and from a practical point of view there is much the same injustice. Nevertheless it is strongly urged by the railroad companies, for example, that they should be allowed to make different rates for commodities which are destined for different purposes. It is, again, pointed out that this policy may be necessary in order to get more traffic, and that this by the law of increasing returns may be for the benefit of all concerned. Moreover, the railroad managers sometimes make here an argument, which they elaborate in other situations, that upon grounds of public policy they should be permitted to make such lower rates as they did in Hoover *v.* Pennsylvania R. R.,[1] where they exacted one rate for coal to be sold at retail for domestic consumption and a lower rate for coal to be used for manufacturing purposes. And, indeed, in that case the court was persuaded that there was a public policy to support such concessions for special purposes in view of the encouragement given to productive industries by such preferential rates. But despite the economic argument, the legal principle remains that to charge different customers who wish the same service different prices, when there is no difference in the conditions under which the service is rendered, is plain inequality, and therefore outright discrimination. Singularly enough, this was the basis of the decision in another Pennsylvania case, Bailey *v.* Fayette Gas-Fuel Co.,[2] which was decided only a few years later. In that case a higher price per cubic foot was charged to customers who used gas simply for illuminating than was charged to such customers as used gas also for fuel. This was properly held to constitute unjustifiable discrimination, and so sweeping was the language of the court as to cover the less obvious case of making different prices for illuminating gas and fuel gas.[3]

[1] 156 Pa. St. 220.

[2] 193 Pa. St. 175.

[3] Special concessions for special business are by the weight of authority illegal dis-

V.

It should now be apparent that the fundamental question under discussion is how far public duty must necessarily deprive those who conduct public employments from basing their business policies upon the elementary principle of the law of increasing returns. That net returns tend to increase with the volume of business in a normal case of an industrial enterprise is obvious; and the question is whether a public service company is to be permitted without hindrance to shape all things so as to hold its present business and to add to it. Some managers of public service companies assert this boldly, and a few say frankly, for example, that they base their rates upon what the traffic will bear, making high charges against business from which high rates can be got, conceding low rates in order to get business which could not otherwise be obtained. Of course this consideration has some place in every philosophy of rate making, but it is submitted that it is a dangerous principle which may often operate to the disadvantage of the public.

The real truth of the matter seems to be that, while in private business nothing need be considered except the law of decreasing cost, in public business there is the law against discrimination to be reckoned with. As the court said in the case of Tift *v.* Southern Ry. Co.,[1] it is no excuse for raising the rate upon a particular article, as lumber, that it will bear the advance; the question is rather what price it is fair lumber should pay in comparison with other commodities. It must be admitted, however, that the view of many economists, that it will be to the advantage of all concerned if railroad managers are permitted to adopt any schedule of rates which will produce the most tonnage, because that policy will by the law of decreasing costs tend with an enlightened management

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criminations. U. P. Ry. *v.* Goodridge, 149 U. S. 680; Com. *v.* L. & N. R. R, 68 S. W. Rep. 1103 (Ky.); Hilton Lumber Co. *v.* Atlantic Coast Line, 53 S. E. Rep. 823 (N. C.); Fitzgerald *v.* Grand Trunk Ry., 63 Vt. 169; Capital City Gas Co. *v.* Central Vt. Ry., 11 I. C. C. Rep. 103; Manufacturer's Coal Rates Case, 3 Can. Ry. Cas. 438. There are some opinions to the contrary. See L. & N. R. R. *v.* Fulgham, 91 Ala. 555 (statutory permission); Bald Eagle V. Ry. *v.* Nittany V. Ry., 171 Pa. St. 284; Metropolitan E. S. Co. *v.* Ginder, [1901] 2 Ch. 799 (statutory construction); Barnard C. V. D. C. *v.* Wilson, [1901] 2 Ch. 813 (same). And in a few cases the point was left undecided, although it was involved. M. K. & T. R. R. *v.* Trinity County Lumber Co., 1 Tex. Civ. App. 553; Smith *v.* Findley, 34 Kan. 316.

[1] 138 Fed. Rep. 753.

to the lowering of all rates, is occasionally adopted by lawyers, and, indeed, has never been stated more strongly than recently, in the case of Interstate Commerce Commission *v.* The Chicago Great Western Ry. Co.[1] But if railway managers are left practically unrestrained by law, it is sufficiently plain that they will maintain a high schedule of rates between localities where they have control of the situation and for valuable goods which will bear high rates, while at the same time making disproportionate concessions from this standard to get business at competitive points or to induce the movement of low grade commodities.

The authorities upon these questions are a seething mass. The various commissions which are near to actual conditions seem to show a tendency to condemn the fixing of the differing rates between localities and the differential rates between commodities solely by economic principles of demand and supply, the unequal and unjust results of which the courts are apparently too far removed from the vital facts to realize or appreciate. But even in the courts a reaction seems to be at hand: in the Naval Stores case[2] the court seemed to be much shocked, at least, by the disproportion between the locality rates there disclosed; and in the Window Shade case[3] the court considered the proportion to be observed between the rate established on raw material and the rate on the finished product. It is not enough to say that this power to make preferential rates may be used for the benefit of a railway's territory as a whole or the industries of the whole country, the fact remains that it is a power which may be abused. So long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again; and, without restrictions by law, it is within their power to protect certain lines of industry and to crush out others. It is believed that these are too great powers to entrust to private hands without governmental control based upon some recognized standards. Indeed, the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all applicants.

[1] 141 Fed. Rep. 1003.

[2] Interstate Com. Com. *v.* L. & N. Ry., 118 Fed. Rep. 613.

[3] Interstate Com. Com. *v.* D. L. & W. Ry., 64 Fed. Rep. 723.

And it seems that there can be violation of this principle by disproportionate rates in different services as well as by discrimination in the same service.

But even if the general principle against every sort of discrimination is held to cover not only absolute discrimination when the conditions are the same, but also relative discrimination when the conditions are different, the difficult condition must be faced that, while the rule against absolute discrimination is in its nature exact and will be seen to be violated if the slightest difference is made in the rates charged to patrons asking substantially the same service, the rule against relative discrimination, on the other hand, must in its nature be inexact, for there are many elements which go to make up the difference between services really unlike, all of which must be taken into account. Whether or not the different rates charged for different services are really disproportionate is not therefore to be settled by any simple computation. Thus, in fixing the relative rates between different localities, it is obvious that it is not a matter of mileage alone, for it is well known that the cost per ton per mile tends to diminish with the length of the haul; still other elements must be considered, such as the increase in the cost of haulage by heavy grades, or the decrease in the cost by handling a dense traffic. In determining whether there is clear disproportion between the varying rates charged to different localities, all these considerations and many more must be taken into account before a decision can be made.[1]

Similar difficulties are encountered in reviewing different rates upon different commodities. Obviously this is not a question of the relative values of these commodities, although that is one

[1] The federal courts have undoubtedly practically committed themselves to the general doctrine that a railroad system may make such preferential rates between different localities as are really necessary to get and hold competitive business, with the probable limitation that the non-competitive rate must not be made thereby unreasonable in itself. C. N. O. & T. P. *v.* Interstate Com. Com., 162 U. S. 184; Texas & P. R. R. *v.* Interstate Com. Com., 162 U. S. 197; Interstate Com. Com. *v.* A. M. Ry., 168 U. S. 144; L. & N. Ry. *v.* Behlmer, 175 U. S. 648; East Tenn. V. & G. Ry. *v.* Interstate Com. Com., 181 U. S. 1; Interstate Com. Com. *v.* Clyde S. S. Co., 181 U. S. 291; Interstate Com. Com. *v.* Southern Ry., 122 Fed. Rep. 800; Interstate Com. Com. *v.* C. P. & V. R. R., 124 Fed Rep. 624. But the state courts at least show some disposition to keep the railways within the limitations upon preferences between localities set by statutes. Illinois C. Ry. *v.* People, 121 Ill. 304; Blair *v.* Sioux City & P. Ry., 109 Ia. 369; L. & N. R. R. *v.* Com., 106 Ky. 633; Cohn *v.* St. Louis I. M. & S. Ry., 181 Mo. 30; Osgood *v.* Concord R. R., 63 N. H. 255. But see Lotspeich *v.* Central Ry., 73 Ala. 806; State *v.* Minneapolis & St. Louis R. R., 80 Minn. 191; *Ex parte* Benson, 18 S. C. 38; Reagan *v.* Aiken, 9 Lea (Tenn.) 609.

element; other factors, such as the care required in handling, the speed necessary, the equipment requisite, and the volume of business, must be taken into account before it can be said with any confidence that there is unreasonable disproportion in the relative rates. But although the rule has inherent difficulties in its application, it cannot be that in expert hands it is really impossible to give it sufficient enforcement to prevent gross injustice. And despite all outcry by railroad managers to the effect that it is practically impossible for others to determine the cost of service, it cannot be that these managers themselves, in fixing their own rates, have no principles for the determination of relative costs.[1]

It is submitted, therefore, that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. A lawyer who saw no visions then would have relied upon the fact that by the weight of authority there was no law whatever against discrimination as such. Provided each applicant for the same service was quoted a rate reasonable in itself, all was then well; although outrageous differences even at that time might be evidence that the higher rate was unreasonable. In the same way today, very probably by the weight of authority, there is no law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be; although it seems to be agreed that outrageous differences may be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion as such may eventually be recognized, despite the fact that it might interfere with the business policies of the public com-

[1] In the following cases among many others a point was made of comparing the rates between different commodities, and the question was raised whether they were reasonable in relation to each other. U. P. Ry. *v.* Goodridge, 149 U. S. 680; Interstate Com. Com. *v.* D. L. & W. Ry., 64 Fed. Rep. 723; Fitchburg Ry. *v.* Gage, 12 Gray (Mass.) 393; Com. *v.* Louisville & N. Ry., 68 S. W. Rep. 1103 (Ky.); Harvard Co. *v.* Pennsylvania Co., 3 I. C. C. Rep. 257; Colorado F. & I. Co. *v.* Southern Pacific Ry., 6 I. C. C. Rep. 489; McGrew *v.* Missouri Pacific Ry., 8 I. C. C. Rep. 630; *Re* Advances in Freight Rates, 9 I. C. C. Rep. 382.

panies even more than the present rule against outright discrimination has done. For it seems plain to the writer that the same principles which forbid any differences when the conditions are the same, should prohibit disproportionate differences when the conditions are different.

VI.

More extreme cases of the possible limitations which public duty may impose upon the business freedom of public companies remain. It sometimes happens in the course of competition between two public service companies that one of them may be bold enough to apply to the other for some facility which it requires in the conduct of its business. It need not be said that no such demand would be made in private business with any hope of success. If public calling is in question, however, why must not the company requested give the company that applies the same service which any one of the public might ask, although of course it may refuse to do anything which it might refuse to do for one of the public? For example, a railroad in course of construction may apply to a rival railroad for the transportation of material; and the case of Rogers Locomotive Works *v.* Erie Ry.[1] would seem to go even so far as to compel one railway company to forward rolling stock to a rival railroad when it is offered as freight. A more complicated case is Owenboro Telegraph Co. *v.* Wisdom,[2] where it was held that when the plaintiff, who was engaged in a general messenger business, had a contract with the defendant telephone company for the use of its telephone in his place of business, the defendant had no right to refuse to permit the telephone to be used in calling up the plaintiff to order a messenger sent to inform a party that he was wanted at a station of a rival telephone company.[3]

Although in general it may be insisted that those who are in public employment must give their rivals such service as other members of the public might require, the rule contains within

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[1] 20 N. J. Eq. 379.

[2] 23 Ky. L. Rep. 97.

[3] It may now be said to be well established that a rival company may demand the same privileges as the general public. In so far as Jenks *v.* Coleman, 2 Sumn. (U. S.) 221, is opposed to this, it must be regarded as no longer law: thus, in South Florida R. R. *v.* Rhoades, 25 Fla. 40, it was held that an agent of a rival concern could not be prevented from travelling. But it is well settled that any person can be prevented from plying trades with passengers inimical to the interests of the carrier. Jenks *v.* Coleman, *supra*; The D. R. Martin, 11 Blatchf. (U. S.) 233; Barney *v.* Oyster Bay, etc, Co., 67 N. Y. 301; Fluker *v.* Georgia Ry., 81 Ga. 461.

itself certain limitations. The principles established do not go so far as to give to one public company the right to demand the use of the facilities of another company in order to compete against it. Thus it seems plain that at common law one railroad company cannot be required to give another running rights over its rails with permission to utilize its stations, even if the applicant offers to pay a reasonable price for the privilege. Indeed, one case, Petition of Philadelphia Railway,[1] went so far as to hold legislation unconstitutional which gave to one street railway the right to acquire upon payment of compensation running rights over the tracks of another without its consent. The fundamental reason which permits a railway to protect itself from such demands of a rival is that it does not undertake to furnish highway facilities to the general public. Another instance from another branch of public service is to be found in Matter of the Baldwinsville Telephone Company,[2] in which a local telephone company demanded the right to utilize the long distance lines of its rival. There was even a statute forbidding telephone companies to discriminate against one another; but the judge said that under such a statute, when truly construed in the light of common law principles, there was no right to demand the utilization of facilities as part of its own system, but the petitioner's rights were to be measured by those secured to an ordinary person seeking to employ the defendant's telephone system.[3]

VII.

Dependent often upon public services are subsidiary businesses in the conduct of which special privileges are absolutely necessary. If those who are managing the principal employment can make

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[1] 203 Pa. St. 354.

[2] 24 N. Y. Misc. 221.

[3] A close case under this heading is whether a common carrier is obliged to accept at the rate for large packages a packed parcel made up by a rival carrier from bundles for transportation from the shipping public. It would seem that the rival is not asking service as one of the public in such cases. Johnson *v.* Dominion Express Co., 28 Ont. 203, so holds; but Chambers *v.* Pennsylvania R. R., 4 Brewst. (Pa.) 563, seems to hold the contrary. Upon similar principles it has been held that a water company may refuse to supply water at wholesale to the owner of several buildings who intends to resell to tenants. United States *v.* American Water Works, 37 Fed. Rep. 747. And in a more striking case still it was held that one gas company could not call upon a rival gas company for a supply to resell to consumers. Public Service Corporation *v.* American Lighting Co., 67 N. J. Eq. 122.

such arrangements as they please with those who apply for these privileges, there is a peculiar opportunity to make additional profits. The general problem therefore arises here in another form, whether in dealing with dependent services the usual obligations of the public service law apply, or whether the management of the principal employment is free to deal with them as it sees fit, consulting only its own interests. There has been, and there remains, a square conflict of authority as to whether this law extends so far as to cover this situation. On one side are the jurisdictions conservative in attitude, which hold that there is no public duty involved and that therefore a carrier may, for example, discriminate among expressmen. On the other hand are the progressive jurisdictions which hold that public obligation is involved, and that the carrier may not, therefore, admit certain hackmen to its station while excluding others.

In the express situation the most prominent decision is certainly the Express Cases,[1] in which the United States Supreme Court finally decided that a railroad company might make an exclusive contract with a single express company, upon the ground that carrying expressmen was not shown to be within its public profession.[2] But the reasoning in the leading case on the other side of this controversy, McDuffee *v.* Portland & Rochester R. R.,[3] seems more fundamental in basing the obligation to deal with all expressmen without discrimination upon the common right to equal service which all have who demand any transportation of a common carrier.[4]

However much it is modified, the conservative view of this matter cannot give the shipping public the full protection which the progressive view assures. For if the public duty does not go to the extent of preventing discrimination in performing it, it seems that little of the law of public service can be applied

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[1] 117 U. S. 1.

[2] This view is held in C. M. & St. P. Ry. *v.* Pullman Co., 139 U. S. 79 (sleeping-car lines); Morris *v.* D. L. & W. Ry., 40 Fed. Rep. 101 (fast freight lines); Pfister *v.* Central R. R., 70 Cal. 169; Louisville *v.* N. A. & C. R. R., 146 Ind. 21; Sargent *v.* B. & L. R. R., 115 Mass. 416; Atlantic Express Co. *v.* Wilmington & W. R. R., 111 N. C. 463; Fort Worth & D. C. Ry. *v.* State, 87 S. W. Rep. 336 (Tex.) (sleeping-cars).

[3] 52 N. H. 430.

[4] This view is held in New England Express Co. *v.* Maine C. R. R., 57 Me. 188; Rogers Locomotive Works *v.* Erie Ry., 20 N. J. Eq. 379 (*semble*); Sanford *v.* Catawissa R. R., 24 Pa. St. 378; Pickford *v.* Grand Junction Ry., 10 M. & W. 397; Parker *v.* Great Western Ry., 7 M. & G. 253.

between the railroad company and the express company; and it would seem to follow that any express company, therefore, may be charged extortionate prices. It may be urged that the express business itself is a public calling, and that therefore the express companies themselves are bound to give satisfactory service at reasonable rates. But their duty is relative; if they must pay extortionate prices, they may charge these against the general shipping public as necessary operating expenses. Therefore, if the whole law governing public duty is not applied between the railways and the expressmen, it would seem to be impossible in any entirely satisfactory way to protect by the law the shippers of express matter from the machinations of those who are concerned with transporting it. For even if this service thus established could be regulated to some extent, the fact would remain that competition might produce better results; at all events, it seems to be inconsistent with public duty to foster a monopoly in a necessary service.

The same problem comes up in a more exasperating form when a railroad undertakes to exclude all but certain favored hackmen from the privileges of its stations. The best reasoned case in support of this policy is perhaps New York, New Haven & Hartford R. R. *v.* Scoville,[1] where the court said in effect that this was a question of management left to the directorate of the railroad free from any coercion by law. And it must be conceded that there are many cases that hold this conservative view, that it is usually best to leave those in public employment to manage their own affairs as they see fit.[2] But from early times there have been men radical enough to point out that such exclusive contracts were truly inconsistent with public duty. On this fundamental ground it was

[1] 71 Conn. 136.

[2] The principal cases to this effect are listed below. Louisville & W. Ry. *v.* West Coast N. S. Co., 198 U. S. 483 (wharfage); Donovan *v.* Pennsylvania Co., 199 U. S. 272 (hackmen); St. Louis D. Co. *v.* L. & W. Ry., 65 Fed. Rep. 39 (draymen); Kates *v.* Atlanta Bag. & Cab Co., 107 Ga. 636 (baggage transfer); Kelley *v.* C. M. & St. P. Ry., 93 Ia. 456 (restaurant); Old Colony R. R. *v.* Tripp, 147 Mass. 35 (baggage transfer); Boston & Albany R. R. *v.* Brown, 177 Mass. 65 (hackmen); Godbout *v.* Union Depot, 79 Minn. 188 (hackmen); Hedding *v.* Gallagher, 72 N. H. 377 (baggage transfer); Brown *v.* New York C. & H. R. R. R., 151 N. Y. 674 (hackmen); State *v.* Steele, 106 N. C. 766 (innkeeper); State *v.* Union Depot Co., 71 Oh. St. 379 (hackmen); N. Y., N. H. & H. R. R. *v.* Bork, 23 R. I. 218 (hackmen); Norfolk & W. Ry. *v.* Old Dominion Co., 99 Va. 111 (baggage transfer); Perth Station Committee *v.* Ross, [1897] A. C. 479 (restaurant); Borsum *v.* Hardie, 23 Vict. Sup. Ct. 479 (hackmen); Worcester Ex. C. Co. *v.* Pa. Ry., 2 I. C. C. Rep. 792 (palace car); The Telephone Case, 3 Can. Ry. Cas. 203 (pay stations).

decided in the early case of Markham *v.* Brown,[1] that an innkeeper could not make an exclusive contract with the proprietors of one line of stages that their representatives should have exclusive access to his guests. And, once established, this is a principle that goes so far as to forbid every exclusive contract which interferes with the public rights.[2]

Those who take the conservative position in all of these questions are prone often to rest their case upon practical convenience, assuring us that only if the common carrier be left to deal with these dependent services as the situation may demand, can these diverse problems be successfully solved in particular cases. That the monopoly system may be found to work well in particular instances does not alter the fact that there is real danger in leaving a public servant wholly without the restraint of law, and able therefore to exploit those whom it is his duty to serve.[3] The time has long since passed when *laissez faire* may be put forward as the better method of dealing with the public services, for if experience in dealing with public employments is teaching anything, it is showing that only the most comprehensive law will prove effectual in the end.

VIII.

Those who are engaged in private business may conduct another business if they please, and then they may put in force policies to foster that business, many of which it is certain that those who conduct a public business may not employ to protect a collateral business. The open recognition of this law, limiting the rights of one engaged in a public employment if he enters into competition with members of the public in various businesses in which his ser-

[1] 8 N. H. 523.

[2] Upon these principles the numerous cases are decided which hold that equal privileges must be given. Indian River S. B. Co. *v.* East Coast Transp. Co., 28 Fla. 387 (wharfage); Mason D. & S. Ry. *v.* Graham & W., 117 Ga. 555 (wharfage); Pennsylvania Co. *v.* Chicago, 181 Ill. 289 (hackmen); Indianapolis U. Ry. *v.* Dohn, 153 Ind. 10 (hackmen); McConnell *v.* Pedigo, 92 Ky. 465 (hackmen); Kalamazoo Hack & Bus Co. *v.* Sootsma, 84 Mich. 194 (hackmen); State *v.* Reed, 76 Miss. 211 (hackmen); Cravens *v.* Rodgers, 101 Mo. 247 (hackmen); Montana W. Ry. *v.* Langlois, 9 Mont. 419 (hackmen); Alexandria B. St. Co. *v.* N. Y., C. & H. R. R. R., 45 N. Y. Supp. 1091 (wharfage).

[3] It is needless doubtless to state the obvious limitation upon the doctrine, that where public duty is not involved, the management of a public service may make such bargains as it pleases with concessionaires, as for boot-blacks, news-stands, barber-shops, and lunch counters. The D. R. Martin, 11 Blatchf. (U. S.) 233; Fluker *v.* Georgia Ry., 81 Ga. 461; Barney *v.* Oyster Bay Co., 67 N. Y. 301; State *v.* Steele, 106 N. C. 766; Audenreid *v.* Phila. & R. Ry., 68 Pa. St. 370; Lewis *v.* W. & N. W. Ry., 36 Tex. Civ. App. 48.

vices are requisite, constitutes the latest development in the rapid growth of the law governing public callings. The question has as yet come before the courts for adjudication only a few times; but even the most conservative courts recognize the necessity of regulation here, while the radical courts are willing in certain instances to go to the extent of prohibition. Indeed, it is feared by many people, who are examining into the dangers affecting modern commerce from these new conditions, that unless those in common callings are held to the strictest accountability the competitive system with its market open to all is in the gravest peril. And the situation would become intolerable if those who control the destinies of trade through their ownership of the public utilities should be permitted to concentrate in their own hands the principal private businesses, which they might not inconceivably do if they were permitted to enter into general business and make use of their superior position to crush their competitors.

When a public service company is also engaged in collateral business, the temptation always is to use the power in its public business to promote its collateral business. An illustration of this was shown in Louisville Transfer Co. *v.* American District Telegraph Co.,[1] where the rather extraordinary state of affairs transpired that the defendant telephone company also operated a carriage service, and therefore had refused to permit its patrons to call the plaintiff transfer company by telephone to order carriages. The court held that it occupied the same position toward the plaintiff as it did toward its other patrons, and must therefore give the plaintiff full telephone service in the conduct of its business.[2] Another extreme case of unfair action may be seen in Mobile *v.* Bienville Water Supply Co.,[3] where the city had constructed both a waterworks and a sewerage system, and had announced a single rate for both sewerage service and water supply, which was the same whether water was taken or not. It was held that the established water supply company might complain of this discrimination by one service in favor of the other as unfair competition, since it was the plain public duty of the city to furnish either service separately at a reasonable rate.[4]

[1] 1 Ky. L. J. 1447.

[2] *Cf.* Electric Despatch Co. *v.* Bell Telephone Co., 20 Can. Sup. Ct. 83, and Postal Telegraph Co. *v.* Hudson River Telephone Co., 19 Abb. N. C. (N. Y.) 46; *accord.*

[3] 130 Ala. 379.

[4] The court obviously holds similar views in Snell *v.* Clinton Electric H. & P. Co., 196 Ill. 626, and in Loraine *v.* P. J. E. & E. R. R., 205 Pa. St. 132.

This development which is going on in the law was brought to the attention of all not long ago by a striking decision of the Supreme Court of the United States in N. Y. N. H. & H. R. R. *v.* Interstate Commerce Commission.[1] That case may go no further than to decide that a railroad company which is engaged in dealing in coal must charge itself its regular schedule rates or it will be guilty of illegal discrimination; but much of the reasoning of the court, if carried to the logical conclusion, would seem to forbid the railroads from taking the inconsistent positions of carriers and dealers.[2] And in Illinois the court long since has taken that further step in Central Elevator Company *v.* People,[3] and held that it is inconsistent with the public duty which a grain warehouseman as a public servant owes its various patrons, for it to engage in the grain business and utilize its own elevator facilities in carrying it on.[4]

These are radical views that are expressed in these last decisions, but serious situations require bold solutions. It may be regarded as already conceded that if a public service company is engaged in two kinds of business, it may not do what might be done in private enterprises, — give itself preference over its rivals. Indeed it may very probably turn out that it will be decided that there is no way in which the situation can be safeguarded. When the public company has two activities, it will be content if need be with the one profit in its serving capacity, and sell its goods at cost if it must, — a sort of competition which its competitor in business cannot meet. Such being the case, it may be established that it is necessary for the maintenance of the highest type of public service to forbid entangling alliances between public services and private businesses, whenever their interests might come in direct conflict with the interests of those whom they have undertaken to serve.

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[1] 200 U. S. 361.

[2] The Interstate Commerce Commission has several times taken occasion to animadvert upon the practices of some railways in conducting collateral business. *Re* Grain Rates of Chicago Great Western Ry., 7 I. C. C. Rep. 33; McGrew *v.* Missouri Pacific Ry., 8 I. C. C. Rep. 630.

[3] 174 Ill. 203.

[4] In accord is Hannah *v.* People, 198 Ill. 77, a much more extreme case, holding a statute passed to permit warehousemen to store grain in their own elevators, unconstitutional because against the general clauses in the Illinois constitution declaring grain elevators public in character.

In Attorney General *v.* Great Northern Ry., 29 L. J. Ch. 794, this public policy was instrumental in causing the court to declare the coal business *ultra vires* of a railroad company.

IX.

That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of the present condition of individual enterprise; indeed, the announced radical program is for government ownership of all public utilities, with its unknowable consequences. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. And it should be sufficiently emphasized at all times in all situations that public servants may not adopt to the prejudice of their public various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

Bruce Wyman.